Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers' Use	)	
Of Customer Proprietary Network	)	
Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	
	)	
Response to Initial Regulatory Flexibility Analysis	)	
	)	

COMMENTS
of the
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES

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November 1, 2001

TABLE OF CONTENTS

SUMMARY

OPASTCO urges the Commission to adopt an opt-out approach to carriers' use of CPNI, at the very least for rural telephone companies. The Commission earlier rejected an opt-out approach to CPNI because it feared consumers might not read or understand the notices that would explain their rights. However, this reasoning does not demonstrate that consumers do not want the benefits that an opt-out approach may offer. Nor does it sufficiently demonstrate a compelling reason for the government to restrict free speech through the use of an opt-in mechanism, especially when market forces can serve as an effective deterrent to improper use of CPNI.

The costs of an opt-in approach are even more burdensome for small companies. Lacking economies of scale, the per-customer expenses would be so great as to discourage most small carriers from exploring innovative service packages and pricing options. If large companies are able to continue successfully marketing new service packages under an opt-in regime, the comparative lack of service and pricing options in rural areas could run afoul of the "reasonable comparability" requirement established in Section 254 of the 1996 Act.

Consumers recognize that the telecommunications marketplace is converging and that carriers are offering an ever-expanding array of services. Therefore, they logically expect companies to offer them communications services that extend beyond those to which they are currently subscribed. If implied consumer consent is considered sufficient for one kind of service provided by a rural telephone company, the same logic should apply to other communications services as well.

The Regulatory Flexibility Analysis in this proceeding is flawed. It asserts that small telephone companies are not "small entities," which conflicts with the Commission's own determination otherwise. It has also prematurely declared that all carriers will be subject to the same consent rules, before it is known what those rules are or how burdensome they might be. A proper regulatory flexibility analysis may reveal that different standards or exemptions for small telecommunications providers may be appropriate.

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I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby files these comments in the above-noted proceeding.[1] OPASTCO is a national trade association representing over 500 small telecommunications carriers serving rural areas of the United States. Its members, which include both commercial

[1] *Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, Clarification Order and Second Further Notice of

companies and cooperatives, together serve over 2.5 million customers. All of OPASTCO's members are rural telephone companies as defined in 47 U.S.C. § 153(37).

OPASTCO members seek to provide a wide array of services to the small communities of which they are a vital part. In addition to serving as incumbent local exchange carriers (ILECs), ninety percent of OPASTCO members also operate Internet service providers (ISPs). Two-thirds of members offer long-distance, and nearly half offer wireless service. Half provide cable television, while slightly over half deliver broadband capability to customers. In addition, one-third of OPASTCO members are operating as competitive local exchange carriers (CLECs) outside of their original territories.

OPASTCO members offer such a variety of services for different reasons. Sometimes, it is because no one else is willing to provide these services to their small, less lucrative communities. In other cases, it is because they want to provide customers with an option to obtain service from a local company that is more able and willing to attend to their needs than a national conglomerate that is located hundreds of miles away. In any event, OPASTCO members are deeply respectful of their customers' proprietary information. After all, their customers are not just faceless accounts, but are their friends, neighbors and relatives. Members of these communities not only expect that their information will not be disclosed to unauthorized parties, but they also expect that their hometown service provider will look out for their interests by offering the highest quality service at affordable rates.

II. THE COMMISSION SHOULD ADOPT AN OPT-OUT APPROACH FOR CPNI, AT THE VERY LEAST FOR RURAL TELEPHONE COMPANIES

A. There is not a compelling state interest that justifies restricting the free speech of small, rural carriers via an opt-in approach to CPNI

The United States Court of Appeals for the Tenth Circuit vacated a portion of the Commission's rules[2] implementing Section 222 of the Communications Act, which governs carrier use and disclosure of customer proprietary network information (CPNI). Specifically, the Court vacated the Commission's "notice and opt-in" requirement before a carrier may use CPNI to market services outside the customer's existing service relationship with that carrier.[3]

The Commission rejected an "opt-out" regime, in part, because it feared that customers might not read or understand notices that would explain the extent of consumer rights and the actions they may have to take in order to opt out.[4] This reasoning does not conclusively address customer consent, because it offers no evidence that consumers do not want the benefits offered by responsible use of CPNI on the part of small carriers. The record does not demonstrate any proof that customers, regardless of whether they might read or understand CPNI notices, do not wish to be informed of new service offerings and rates that might suit their needs.

The Second FNPRM asks if there are differences between CPNI and the information that is protected in other industries, such as financial services and health care.[5] Like personal

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[2] *U S WEST, Inc. V. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (Jun. 5, 2000) (No. 99-1427) (*U S WEST v. FCC*).

[3] Second FNPRM, paras. 3, 6.

[4] *Ibid*., para. 15.

[5] *Id*., para. 16.

financial and health information, the distribution of CPNI to unauthorized third parties may cause distress to consumers, and prohibitions against such abuses are warranted. However, as the Tenth Circuit Court noted, there is no indication that such disclosure might occur, and the Commission recognizes that disclosure of CPNI within a company is of no concern.[6] Obviously, internal disclosure and use of CPNI within a carrier is not comparable to the harm or distress that might befall consumers if personal financial or health care information were abused or even examined by nonaffiliated entities. The Second FNPRM correctly notes that the financial services rules allow for an opt-out approach.[7] If an opt-out approach is sufficient for far more sensitive financial information, the same approach certainly provides adequate protection for CPNI.

The Second FNPRM also acknowledges that the Tenth Circuit was unclear on the government's privacy interest with regards to CPNI, as well as the potential harms that might arise from either an opt-out or opt-in approach, and seeks comment on those areas of the Court's analysis.[8] The government's privacy interest is slight, because the potential harms to consumers under opt-out are negligible, especially when compared to the potential benefits. The most harm a consumer might face from the use of CPNI is a momentary irritation at a marketing attempt, compared to the far more dire consequences that might come about from the

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[6] *U S West v. FCC*, p. 27, citing the Second Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Consumer Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Dockets No. 96-115 and 96-149, 63 Fed. Reg. 20,326 (1998), para. 55, n. 203.

[7] Second FNPRM, para. 16, n. 36.

[8] *Id*., paras. 17, 19.

use or disclosure of personal financial information. Consumers that do object to CPNI use in marketing have means to achieve redress if they so desire, as explained below.

Even if customers do not desire to learn of new services and better rates, there is no indication that this reaches the level of state interest. Whether to market certain services or not to a given population of consumers is always a business decision. Under an opt-out regime, if any CPNI-based marketing displeases consumers, not only can they exercise their prerogative to opt out, but they can decline to do additional business with the company in question. This market-driven sanction is a powerful disincentive to using a customer's CPNI irresponsibly.

Importantly, this market-driven "carrot and stick" incentive relies not upon government's determination of what is "good" or acceptable for consumers, but upon consumers' own determinations. Therefore, it is in small carriers' self-interest to utilize CPNI with a great deal of care. This applies not only to unregulated, competitive services, but also increasingly for basic local service for which there has traditionally been only one provider. For example, even in rural areas, it is becoming more common for some customers to switch to wireless providers for their primary voice service.

While potential harms to consumers' privacy under an opt-out approach are slight, the potential net harms under opt-in are greater. An opt-in approach will restrict the ability of small carriers to offer innovative and diverse service packages that can be designed based upon actual usage patterns and the needs and desires of real consumers. Opt-in will impose more costs on small carriers without equitable consumer benefits, thereby restricting the ability of

these carriers to expand their offerings still further. Most importantly, an opt-in approach will deprive many consumers who would welcome learning of service packages that may be more appropriate for them of the chance to ever learn about them, simply because these consumers understandably decline to jump through confusing government-imposed hoops in order to hear from their provider. For these reasons, OPASTCO believes that an opt-out process best serves the public interest, at the very least for the customers of rural telephone companies.

B. An opt-in approach to CPNI is inherently more costly and restrictive than opt-out, especially for small, rural carriers

The Second FNPRM seeks comment on the relative costs and convenience of both opt-in and opt-out approaches, and the court's determination that opt-out is a "substantially less restrictive alternative."[9] Clearly, the costs and restrictions of opt-in are far greater than opt-out. Under an opt-out approach, carriers need only ensure that the wishes of those customers who have determined that their CPNI not be used are respected. This permits small carriers to concentrate more of their limited resources into developing new service packages for customers.

In contrast, the costs and restrictions of an opt-in approach are so onerous that many small carriers will have to abandon all but the most rudimentary efforts of crafting diverse offerings. While large carriers, with tens of millions of customers, may get sufficient numbers of customers to actively opt in to the company's use of CPNI in a statistically significant manner, few small carriers may be able to do so. Further, many small carriers have limited in-house data

[9] *Id*., para. 20.

processing and marketing production facilities and personnel. Thus, expensive subcontracting may be necessary in order to comply with an opt-in mandate. For instance, a small carrier of 5,000 access lines would have to pay a software contractor approximately $40,000 for a single program to cross-reference databases. The lack of economies of scale for small carriers translates into real costs.

Similarly, efforts to inform consumers of opt-in procedures are more costly on a per-consumer basis for carriers that serve fewer customers. Thus, the costs of an opt-in regime would be so prohibitive for many small companies, that it would severely hinder efforts to develop new service packages, except perhaps on a highly limited basis. Because rural telephone companies predominately serve high-cost areas, this situation could run afoul of Section 254(b)(3) of the Telecommunications Act of 1996 (the Act), which requires that the services and rates offered in urban and rural areas are reasonably comparable.[10] This is another reason why an opt-out methodology is essential for rural telephone companies.

C. The implied consumer consent provided by an opt-out approach is sufficient for all of the communications services provided by a carrier

Adoption of notification and opt-out would in all likelihood increase the incidents of implied customer approval for the use of CPNI to cross-market services. However, the record does not put forth any indication of how this result would necessarily generate a negative

[10] 47 U.S.C. § 254(b)(3): "Access in Rural and High Cost Areas - Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunication and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."

consequence. It can be equally theorized that customers want and expect their providers to make them aware of new or different products and services that are better tailored to their needs or that they may have a significant interest in. If implied consumer consent is considered sufficient for the types of services a customer already subscribes to, it should be sufficient for other communications products and services, as well. In fact, consumers quite reasonably have this very expectation. As consumers make increasingly fewer differentiations between converging communications products and services and the companies that offer them, they find it baffling when their provider makes a formal request for permission to use the information that the customer already knows is in the provider's possession. Therefore, the implied customer approval associated with an opt-out approach should be adopted for marketing services beyond those included in the customer's existing service -- at the very least for rural telephone companies.

III. THE INITIAL REGULATORY FLEXIBILITY ANALYSIS IS FUNDAMENTALLY FLAWED

The Second FNPRM's Initial Regulatory Flexibility Analysis (IRFA) is deficient. As a preliminary matter, the IRFA inexplicably reverts to language[11] which incorrectly suggests that small ILECs are not "small entities" under the Regulatory Flexibility Act.[12] It then declares that whatever consent rules are adopted "will be applicable to all carriers,"[13] even though the Commission has not considered any alternatives, contrary to the requirements of 5 U.S.C. §

[11] IRFA, para. 9.

[12] 5 U.S.C. § 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. § 612(a)).

[13] IRFA, para. 26.

603(c). The IRFA has taken these positions with no knowledge of the burdens that small ILECs may face, while differing rules may indeed be appropriate.

A. The Commission itself has previously acknowledged that small ILECs are "small entities" under the Regulatory Flexibility Act

As stated above, the IRFA has inexplicably reverted to the position that small ILECs are not "small entities" under the Regulatory Flexibility Act. However, this is an erroneous position that the Commission corrected over two years ago.[14] Hopefully this is simply the result of an error, instead of an indication that the Commission is attempting to revive this long-discredited stance.

B. The Commission's declaration that all consent rules will apply to all carriers, before it even knows what the rules will be, completely undercuts the purpose of a Regulatory Flexibility Analysis

Congress passed and amended the Regulatory Flexibility Act because it knew that when regulations designed for large companies are imposed upon small companies, the burdens and costs imposed on those companies and their customers can outweigh the benefits. That is precisely why Congress requires federal rulemaking agencies to consider at least four alternatives to proposed rules, as the IRFA correctly recites:

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[14] The Commission, after numerous protests from various parties including OPASTCO, the United States Small Business Administration (SBA) and several members of Congress, has acknowledged small ILECs as "small entities" for Regulatory Flexibility Act purposes since August 31, 1999; *see* Letter *from* Francisco R. Montero, Director, FCC Office of Communications Business Opportunities to Jere Glover, SBA Chief Counsel for Advocacy, re: Treatment of Small Incumbent Local Exchange Carriers under the Regulatory Flexibility Act. *See also*, *Federal Communications Commission Biennial Regulatory Review 2000 Staff Report* (rel. Sept. 18, 2000), para. 177: "Another 1999 initiative was the resolution of the Commission's treatment of small incumbent local exchange carriers (LECs) under the RFA…Following a letter on the subject from the Office of Advocacy and a meeting between agency staffs, the Commission decided to revise the language of its decisions to make clear that small incumbent LECs are among the small businesses

> (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[15]

The IRFA admits that it cannot describe any projected requirements due to a lack of proposed rules or tentative conclusions.[16] Obviously, if the rulemaking body itself has no preconceived idea of what the final rules might be, there is no way it can make the pre-judgement that its final rules will be appropriate for all entities. The IRFA's declaration that all consent rules will apply to small carriers amounts to a declaration that when rules are decided upon, the Commission will decline to perform a Regulatory Flexibility Analysis. Congress has not given the Commission that option.

As OPASTCO has pointed out in the past, consumers of small carriers deserve the same protections as consumers of large carriers. However, this does not mean that imposing the same burdensome, costly rules on small carriers will bring the same net benefits to consumers of small carriers that customers of large carriers may receive. The consumer ultimately pays the cost when small carriers must divert their scare resources away from the provisioning and delivery of service and into regulatory compliance.

C. Differing standards or exemptions for small carriers may be appropriate

As noted *supra*, an opt-in approach to CPNI would impose higher per-customer costs

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included in its analyses under the RFA."

[15] IRFA, para. 25, citing 5 U.S.C. § 603(c).

[16] *Id*., para. 24.

on a small carrier than on a larger organization. For that reason alone, a proper Regulatory Flexibility Analysis may well demonstrate that different standards or an exemption might be appropriate for small entities. Even if the Commission finds that an opt-out approach is not suitable for customers of large, multi-state entities, there are numerous reasons why it could be a fitting approach for customers of small companies. This is even more apparent when considering Section C of the Second FNPRM, which is primarily concerned with affiliate rules for Bell Operating Companies (BOCs).[17]

Small carriers do not operate in the same regulatory environment as BOCs. BOCs and rural carriers have differing affiliate rules, and BOCs are subject to restrictions on the provision of certain services by Section 271 of the Act. Similarly, small carriers and BOCs do not always operate in the same market conditions. BOC customers typically have a choice of many different long-distance calling plans that are often not offered to consumers in rural areas. Small carriers sometimes offer other services, such as cable television, that BOCs traditionally do not. They also may provide wireless service in partnership with BOC competitors. Small carriers may also be a community's primary Internet access provider, a position that is uncommon for BOCs. These differences alone reflect a myriad of possibilities, apart from the sheer costs, where exemptions or other differing standards might appropriately benefit consumers of small carriers, should an opt-in approach be adopted.

IV. CONCLUSION

For the reasons stated above, an opt-out approach is the most narrowly-tailored, free-

[17] Second FNPRM, paras. 24-26.

market based approach to protecting CPNI. There is no state interest great enough to curb the speech of rural telephone companies. An opt-in approach is far more costly, especially for small carriers, and would stifle creative service offerings in rural areas. Customers of small carriers expect their providers to alert them to new communications service offerings regardless of whether nor not they are related to those the customer is currently subscribed to. Finally, the Commission is required to perform proper Regulatory Flexibility Analyses, and may not shirk from this duty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alicia C. Reid, hereby certify that a copy of the comments by the Organization for the Promotion and Advancement of Small Telecommunications Companies was either hand-delivered or sent by first class United States mail, postage prepaid, on this, the 1st day of November, 2001, to those listed on the attached sheet.

/s/ Alicia C. Reid

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